Submission to FOI Review
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Thank you for the opportunity to make this submission to the FOI review.

the impact of reforms to freedom of information laws in 2009 and 2010, including the new structures and processes for review of decisions and investigations of complaints under the FOI Act, on the effectiveness of the FOI system;

The FOI Act reforms represent a significant improvement in the previous Act. The Act, both explicitly and structurally creates a clear preference for disclosure of information.

Unfortunately, the responses to these changes by many Departments hasn't always been in the same spirit. Changes in the cultures of many departments have been slow and sometimes non-existent.

In the time since the Act was amended, I have made numerous FOI requests from a number of Departments, have sought both internal and OIC review of requests.

I have been requesting information on behalf of organisations working in the public interest and not seeking personal information.

My observations in that time include:

Cultural change hasn't occurred yet
A culture of secrecy and non-disclosure still prevails in most Departments. Very little information that would be released under FOI is released pro-actively.

Many FOIs are released with substantial redactions and exemptions. I have seen redactions of single words; redactions that departmental staff later acknowledge were inappropriate or inexplicable.

Currently, I am seeking under FOI documents relating to dredging and sea dumping from Sewpac. If these permits are issued under the EPBC Act, the application process is public. If the permit is applied for and issued under the Sea Dumping Act, the process is secret, even though the same department and staff would assess the application. This is the type of material that should be published without FOI and yet this FOI has now taken 3 months and because of a backlog I don't expect to see the documents until the end of January.

Some of the recommendations below are meant to address this issue of cultural change and put pressure on departments to accomplish that shift internally.

Publication
The publication requirement means easy access to documents, even those requested by others. Some Departments such as DRET put links to the documents on their log page. Others require that you contact them to request documents. Links are easy and require less work for everyone.

Recommendation:
The disclosure logs for Departments are required to include links to the documents

Time frames for disclosure
Departments too often appear to make every effort to delay release. It is rare that Departments make decisions prior to the final date in which they can do so, even when the requests are quite straightforward, such as a request for a specific and known document. A common occurrence is to be informed – after 30 days – that the request is voluminous and the Department is considering denying a request. Negotiations that

ensue are difficult, because it is often not clear where the excess volume of documents come from.

Recommendation:
Amend the Act so that in circumstances where the request is deemed too large, the applicant must be informed of this within 15 days and this must include a list of the files that support that conclusion. This will allow applicants to make more informed decisions in order to narrow the scope of the request.

Recommendation:
If the request is for specific documents as opposed to a class of documents (eg Treasury costings of the MRRT or briefing note to the Minister of 7 December 2011 regarding Abbott Point), the time frame for decision should be reduced to 15 days.

Conditional exemptions are one of the most important changes made in the FOI Act. The shifting of the burden to a Department or agency to demonstrate why materials should not be released is critical to changing the culture of secrecy. At the moment it isn't working. Departmental justifications for exemptions and redactions are poor and frequently little more than a restating of the grounds and criteria for exemptions without providing any evidence that specific redactions or exemptions satisfy these grounds. The reasoning and articulation of these tests, including the public interest test, are cursory and boilerplate. For instance, I have seen arguments made in relation to a s45 exemption (documents obtained in confidence) that don't even bother to try and satisfy the test for breach of confidence that the section clearly requires. An assertion of breach has been sufficient to tie the matter up in review for over a year. While it is not surprising that this occurred early in the new Act, it unfortunately hasn't changed and the Act needs amendment to ensure that grounds for exemptions and redactions that are not adequate are significantly reduced.

Recommendation:
The OIC Review officer must base his/her decision on review on the arguments and information provided in the decision letter.

In other words, the arguments for redactions and exemptions made in decision letters are binding on the Department and OIC review officer. This will simplify and make the process more efficient. It will reduce delay and ensure that departments will think through redactions and exemptions they are proposing to make.

Some of the conditional exemptions need review and perhaps greater definitional clarity. In particular, the 'deliberative' document exemption remains a catch-all basis for refusing access to documents. Often this appears to be based on the fact that an internal document may express opinions or provide advice contrary to decisions made. It is unclear why deliberate documents should even be a conditional exemption. Deliberation and disagreement in a department is a sign of a healthy department that grapples with difficult problems and issues. The advice that is received, the differences that are resolved and the ultimate decisions that are made constitute a chain of information that can reveal the thought and evidence that went into decisions that on their face may not be clear. This exemption actually seems to contradict the purpose of the new FOI Act and the public interest it purports to support.

Recommendation:
Eliminate the deliberative documents exemption in the FOI Act.

Alternatively, deliberative documents may be designated as deliberative. They are released but it is explicit that the document does may not represent government policy.

Commercial in confidence is profoundly overused. It is used to refuse access to documents that involve any level of commercial information. This may include the financial structure and viability of an organisation. It may include information regarding plans for developments. It often includes information in situations where the commercial interest is not in competition with anyone because they already hold exclusive licence or rights in a particular area. It is used to exclude even the fact of negotiations being undertaken and with whom. It is used to exclude information that may reveal levels of influence and access that a company has. In fact, the scope of the CiC exemption as used is so broad that Departments routinely exempt a wide range of materials that should not be excluded.

Additionally, in circumstances where an entity is seeking public monies or benefits, those entities should expect that they are subject to a higher level of disclosure than in other circumstances. They may choose not to participate in such a process if they believe that disclosure will cause greater harm than the benefit they are hoping to receive. For instance, an FOI was undertaken with the Department of Energy regarding, HRL a brown coal company that had been awarded a $100m grant under a clean energy program. Numerous documents were exempted or redacted on the basis of commercial in confidence. Most of these included documents that were essential to the government determining whether HRL was a suitable company to receive $100m in public funds. Clearly, evidence of a company's capacity to succeed; their capacity to raise finance, compete in the international market with a new technology, are issues that were at the heart of the assessment and award decision – and at the heart of why the public should have access to materials such as these.

Recommendation.

Commercial in confidence
The following test for a claim of commercial in confidence exemption be used:

1. Is the information provided to the Department part of a discretionary or mandatory process?
   a. if the process is discretionary, information that must be provided as part of a discretionary process may not be exempted as commercial in confidence unless
      I. the material is of a kind that inherently has commercial value (eg trade secrets, production method), and
      II. disclosure would result in demonstrable commercial harm

2. If the information is provided as part of a mandatory process to which a group of businesses or entities are subject, then commercial in confidence may be used more broadly to protect information that may give commercial advantage. This should remain a conditional exemption.
3. Is the information provided by an entity that already has an exclusive right, licence or authority from the Government? Information held by the department relating to the acquisition or use of such exclusive right is not exempt from FOI unless:

I. the material is of a kind that inherently has commercial value (eg trade secrets, production method), and
II. disclosure would result in demonstable commercial harm

4. Is the commercial entity the recipient of public monies, or a holder of licences involving public property? If the information is part of a mandatory process (eg a regulatory requirement), the current rules can still apply but the Department must make the case for commercial in confidence – not simply assert harm as is the current case.

As recommended above, Departments must make the case for commercial in confidence in their decision letter. This will reduce delays, increase the push towards greater transparency and reduce review requests.

Costs
Costs remain a major issue and the OIC's recommendations regarding charges will not assist. The major cost for most FOIs is decision time. The more that is redacted, the more that is excluded, the longer the process takes and the more it costs. The cost structure should reflect and support the underlying objective of the FOI Act – greater disclosure. At the moment, the costing mechanism has the perverse effect of reducing transparency and increasing the costs of disclosure.

Virtually all the FOI requests I have made are for non-profits. Unlike for-profit organisations, we do not derive any direct financial benefit from the FOI work that we do. Costs are a significant impediment to that work. Eliminating costs associated with FOI may initially result in an increase in the number of FOI requests, but it will also prompt departments to pro-actively publish more and to spend less time on

redactions and exemptions.

A one-off application fee of $50 would be justified.

Recommendation:
Eliminate decision time fees and replace costs with a $50 one-off application fee

Public Interest
While the public interest test in the OIC Guidelines is quite broad, it needs to have better implementation by Departments and broader application.

In particular, analysis of the public interest in conditional exemptions is frequently a boilerplate analysis, ultimately rejected. A binding decision letter would improve this situation.

While I would favour the elimination of FOI fees except a nominal application fee, an alternative may be to require departments to assess whether the FOI is in the public interest and if so to waive the fees without the need for a formal request.

Recommendation:
The public interest test should be applied immediately to all non-personal FOI applications without the need for separate application. If the FOI is found to be in the public interest, fees should be waived. A 7 day period for this test should be permitted. Failure to complete this process in 7 days will result in a deemed waiver of fees.

(a) the effectiveness of the Office of the Australian Information Commissioner;

I fully support the idea of the OIC and its independence. I question neither its skills, dedication nor structure, but it is clear that the review process is far too ponderous and slow, decisions are not made in a timely manner, and there appears to be little understanding of the effects of delay in relation to disclosure.

I have sought review on three occasions. None have been resolved in under 9 months. This is unacceptable.

Timeliness matters. There are many reasons for undertaking FOIs, but virtually all the FOIs I have been involved in are relating to matters that are current, matters where decisions are still to be taken, matters where there is potential for greater public involvement through greater public knowledge.

Departments or Governments are very aware that delay may be as useful as exemption. If the review process is not timely and a Department wants to avoid embarrassment or scandal or greater scrutiny, then initial exclusion or redaction will protect them from disclosure, particularly within the timeframes that may be identified as most dangerous or volatile.

Recommendation:

1. Implement strict time frames in the review process
2. 30 days for an initial decision on the review based on the decision letter, review request and exempted or redacted documents.
3. Ensure that resourcing is sufficient to meet these requirements

Agencies exempt from the FOI Act

Of particular concern to me is the exemption of CSIRO from the Act for its commercial activities (schedule 2 via section 7). I have seen CSIRO's submission to the FOI review process and its argument for a blanket exemption is no different from the arguments made by any agency seeking non-disclosure of commercially

related documents.

The implications of this exemption are worrisome. I am aware, for instance, that many of the projects undertaken by CSIRO Plant industries are funded by large biotech companies. None of the information regarding those commercial arrangements are available under FOI, despite a strong and broad public concern that stretches back over 10 years. That includes revenue received directly by CSIRO; in-kind contributions made either by CSIRO or the private party; terms of the contract relating to publication; publication of negative or nil results; release of testing data, any contractual terms that my allow private parties to control data, results, conclusions or publication.

It is well established that corporate funding of science is far more likely to result in study designs, study methodologies, study outcomes, analysis and conclusions favouring the funding body. It is exactly this type of information that should be public and subject to oversight in order to avoid compromising the integrity and reputation of CSIRO.

CSIRO is publicly funded and is a public institution. The right of the public to know where its funds are going and in what manner they are being used and the rights of the public to exercise oversight of the financial affairs of a public institution should override the demands of commercial interests that no information be disclosed.

Recommendation

CSIRO's exemption be removed and CSIRO is subject to the same exemptions and conditional exemption as all other agencies.

Cabinet documents

While there are clearly sensitive documents that go to Cabinet, it is well known that documents will go into Cabinet in order to avoid FOI.

It is impossible to guess how widespread this practice is, but it should be discouraged.

Recommendation

For exemptions based on the material being a cabinet document, the agency must demonstrate that the documents were part of the deliberations for a Cabinet decision.

the desirability of minimising the regulatory and administrative burden, including costs, on government agencies.

Reduction in costs and administrative burdens is best achieved by creating a climate and culture of disclosure, not by erecting unnecessary impediments to disclosure. In the short term, the shift to a culture of openness may see administrative burdens increase as departments grapple with or resist change, but once that shift occurs and materials are released as a matter of course, both burden and costs will diminish. It is important that this remain as an incentive to agencies to become more pro-active in their disclosure practices.

the necessity for the government to continue to obtain frank and fearless advice from agencies and from third parties who deal with government;

This is a common argument for non-disclosure. Once again, like commercial in confidence, different circumstances may warrant different tests. Once again, this must be addressed in part through an understanding of the cultural change that must occur within departments.

Over and over again, I have seen this argument used simply because of the risk of embarrassment or the belief at a general level, that agencies or individuals won't be frank or fearless if disclosure is a risk. This generalised and culturally driven view should not be supported by any changes in the regulations. Many agencies that have worked in secrecy and without exposure to public scrutiny for years fear the kind of change envisaged in the FOI Act. Ensuring that frank and fearless advice continues to be given in a culture

of disclosure will not be helped by protecting a culture that needs change. It requires time for departments and officers to understand that they are expected to continue to give such advice even if it will be disclosed and even if that disclosure may result in public debate or criticism. This should be encouraged.

There may be circumstances in which actual harm to relationships could occur, and the onus must be on the department to demonstrate (not simply assert) that harm.

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7/12/12